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THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

Appellate Case Nos. 2018-001165 and 2018-002117

Public Service Commission Docket No. 2018-2-E

South Carolina Coastal Conservation League and
Southern Alliance for Clean Energy.....Appellants,

v.

South Carolina Electric & Gas, CMC Steel South Carolina,
South Carolina Energy Users Committee, South Carolina
Solar Business Alliance, LLC, Southern Current, LLC and
South Carolina Office of Regulatory Staff, ...Respondents.

and

South Carolina Solar Business Alliance, LLC, ...Appellant,

v.

South Carolina Coastal Conservation League and Southern Alliance for
Clean Energy, South Carolina Electric & Gas, CMC Steel South Carolina,
South Carolina Energy Users Committee, Southern Current, LLC, and
South Carolina Office of Regulatory Staff,

Of whom South Carolina Electric & Gas and South Carolina
Office of Regulatory Staff, are..... Respondents.

FINAL BRIEF OF APPELLANT SOUTH CAROLINA SOLAR BUSINESS ALLIANCE, LLC

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STATEMENT OF ISSUES ON APPEAL

I. Did the Public Service Commission of South Carolina (the "Commission") err by improperly shifting the burden of proof from South Carolina Electric & Gas ("SCE&G"), which sought approval of a new avoided cost rate, to the South Carolina Solar Business Alliance ("SBA") (and other intervenors) challenging that rate?

II. Did the Commission err by failing to find that SBA (and other intervenors) presented sufficient evidence to raise a "specter of imprudence" with respect to SCE&G's proposal to eliminate capacity payments to independent power producers, thereby overcoming any presumption of reasonableness with respect to that proposal and placing the burden on SCE&G to prove its reasonableness?

III. In the alternative, did the Commission erred by failing to make sufficient factual findings as to its application of the burden-shifting scheme in connection with its approval of SCE&G's Proposal to Eliminate Capacity Payments to Independent Power Producers?

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STATEMENT OF THE CASE

Appellant South Carolina Solar Business Alliance, LLC, ("SBA") appeals from Orders of the Public Service Commission of South Carolina (the, "Commission") approving South Carolina Electric & Gas' ("SCE&G") most recent wholesale "avoided cost" rates paid for independently produced renewable energy. On October 4, 2017, the Clerk's Office for the Commission set the hearing date and procedural schedule for the annual review of SCE&G's fuel purchasing practices, distributed energy resource programs, and related policies and cost recovery under S.C. Code Ann. § 58-27-865. (R. p. 219; Notice of Hearing and Prefile Testimony Deadlines.) The Commission also considers and approves SCE&G's avoided cost rates, terms, and conditions in this annual proceeding.

SBA, along with other Appellants including the South Carolina Coastal Conservation League and Southern Alliance for Clean Energy (collectively, the "Conservation Groups"); CMC Steel South Carolina; South Carolina Energy Users Committee; and Southern Current, LLC successfully intervened in the docket. The South Carolina Office of Regulatory Staff ("ORS") appeared in the docket as a statutory party. SCE&G's direct testimony was due February 23, 2018, direct Testimony of other parties was due March 23, 2018, Rebuttal Testimony of SCE&G was due March 29, 2018, and Surrebuttal Testimony of other parties was due April 4, 2018. The Commission denied a motion to bifurcate the proceeding that would have afforded the parties more time to analyze and respond to SCE&G's request to change its avoided cost rates. (R. pp. 196-97; Order No. 267; R. pp. 639-47; Tr. Vol. I, pp. 9-17.) The Commission also dismissed a request from intervenors that SCE&G update the inputs it used in the previous year's fuel cost docket avoided cost methodology to generate fuel cost values not influenced by other changes in the methodology. (R. pp. 198-201; Order No. 2018-42H; R. pp. 202-03; Order No. 2018-44H.)

After the parties pre-filed extensive Direct, Rebuttal, and Surrebuttal Testimony, the Commission held an evidentiary Hearing on April 10, 2018 and April 11, 2018. (R. pp. 631-1532; Tr. Vols. I and II.) At the Hearing, witnesses testified for SCE&G, ORS, the SBA, and the Conservation Groups. The parties submitted Post-Hearing Briefs and Proposed Orders on April 19, 2018.

The Commission issued an Order and then issued an Amended Order on May 2, 2018, replacing the prior Order. (R. pp. 138-88; Order No. 2018-322(A).) In its Order, the Commission approved SCE&G's proposed avoided cost rates. The SBA, Conservation Groups, and the South Carolina Office of Regulatory Staff ("ORS") each petitioned for reconsideration of issues related to SCE&G's avoided cost rates. The Commission voted to grant a request from the South Carolina Energy Users Committee ordering SCE&G to share reports and forecasts under particular circumstances, but otherwise denied all the Petitions for Rehearing and/or Reconsideration and issued a written Directive to that effect. (R. pp. 207-18; May 23, 2018 Directive.)

On October 30, 2018, the Commission issued its final Order denying Petitions for Rehearing and/or Reconsideration filed by the SBA, Conservation Groups, and the ORS. (R. pp. 189-94; Order No. 2018-708.) The SBA filed a Notice of Appeal from the Commission's May 2, 2018 order, May 23, 2018 directive, and October 30, 2018 order on November 28, 2018. (R. pp. 568-630; SBA's Notice of Appeal.)

From the May 2, 2018 Amended Order, the May 23, 2018 Directive Order, and the October 30, 2018 Order denying the Petitions for Reconsideration and/or Rehearing (collectively the "Challenged Orders"), SBA appeals to this honorable Court.

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STATEMENT OF FACTS

The Public Utility Regulatory Policies Act ("PURPA") is a Federal Statute enacted to encourage the development of cost-competitive and independently produced energy, with the goal of diversifying the nation's electric supply and promoting national security and resilience of the nation's electric system. Its protections extend to solar energy producers and are designed to prevent monopoly investor-owned utility companies from erecting barriers that prevent independent power producers, such as solar facilities, from entering the marketplace. *See, FERC v. Mississippi*, 456 U.S. 742, 750-51, 102 S.Ct. 2126, 2132-33 (1982); *Schuylkill Energy Resources v. PP&L*, 113 F. 3d 405, 410-11 (3d Cir. 1997). PURPA, which is implemented by the Federal Energy Regulatory Commission ("FERC") and State Public Service Commissions like the Public Service Commission of South Carolina, requires utilities to pay an administratively-determined "avoided cost" rate to certain independent power producers referred to as "Qualifying Facilities" or "QFs". (R. p. 821, lines 6-17; Tr. Vol I, p. 191, lines 6-17).[1]

The Commission conducts annual fuel cost proceedings to determine the avoided cost rates that SCE&G must pay. Avoided cost rates include an "avoided energy" component and an "avoided capacity" component. (R. p. 821, line 19-p. 822, line 11; Tr. Vol I, p. 197, line 19 – p. 198, line 11.)

[1] Generally speaking, QFs include cogeneration units meeting certain performance criteria, and renewable power producers (e.g. solar and biomass generators) with a nameplate capacity of 80 megawatts or less. 18 C.F.R. § 292.203.

Energy costs are the variable costs associated with the production of electric energy, such as fuel costs or operations and maintenance costs. Capacity costs are those costs associated with providing the capability to deliver energy and consist primarily of the capital costs of energy generating facilities. FERC Order No. 69, 45 Fed. Reg. 12214, 12216 (Feb. 25, 1980). So avoided energy costs would include, for example, the costs of natural gas or other fuel that the utility can avoid paying because it purchases energy from a QF instead of generating its own energy. Avoided capacity costs include the cost of new generating units the utility doesn't have to build because it can get that capacity form a QF.

Avoided cost rates are generally calculated using complex computer simulations that are proprietary to SCE&G, to which Appellants, including SBA, were not given access during the rate-making proceedings. (R. p. 1025; Tr. Vol I, p. 395, lines 10-13 (Witness Glick Direct Testimony: "[T]here were no documents provided in discovery that would allow one to replicate the calculations that the [SCE&G] did last year using an updated resource plan to come up with an exact value.").)

In early 2017, SCE&G revised its rates to substantially decrease the capacity payments made to QFs. It attributed the proposed reduction in capacity rates to the planned completion of the V.C. nuclear project, which would satisfy the most of SCE&G's capacity needs for the immediate future. (R. p. 662, lines 3-15; Tr. Vol I, p. 32, lines 3-15.)

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The abandonment of the V.C. Summer project in the summer of 2017 would have been expected to result in an increase in avoided capacity rates. (R. p. 1285, line 15-p. 1286, line 12; Tr. Vol II, p. 655, line 15-p. 656, line 12.) And SCE&G's witness acknowledged at the Hearing that, had SCE&G had performed preliminary calculations of capacity rates after the failure of the V.C. Summer project, but opted not to file revised rates that that time. (R. p. 682, line 13-p. 683, line 16; Tr. Vol I, p. 52, line 13-p. 53, line 16.) However, SCE&G did not revise its capacity rates upward to account for the new capacity shortfall. Instead, SCE&G simply opted not to perform a rate update (which was, according to the schedule previously requested by the SCE&G, due in November 2017), and then in 2018 proposed new rates that would completely *eliminate* capacity payments for solar QFs. SCE&G did not perform any analysis or calculation to justify the *zero* capacity rates; it justified its decision to eliminate of capacity payments on the premise that solar QFs do not provide capacity on most cold winter mornings, and that SCE&G had come to the conclusion that it was now (contrary to past practice) a winter peaking utility, and thus required to maintain huge reserves of capacity on those winter mornings. (R. p. 641, line 18-p. 642, line 3; Tr. Vol I, p. 11, line 18-p. 12, line 3; R. p. 798, lines 13-23; Tr. Vol. I, p. 168, lines 13-23; R. p. 838, line 7; Tr. Vol. I, p. 208, line 7; R. p. 842, line 9; Tr. Vol. I, p. 212, line 9.) This was a major departure from SCE&G's prior, Commission-approved methodologies for calculating avoided cost, and would completely eliminate capacity payments made to solar QFs. (R. pp. 1024-31, 1050-56; Tr. Vol I, pp. 394-401, 420-426; R. pp. 1208-22, 1229-43, 1398-1405, 1430-59; Tr. Vol. II, pp. 578-592, 599-613, 768-775, 800-829.)

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During the 2018 rate-setting proceedings, the SBA and other intervenors pointed out numerous problems with the underlying studies informing SCE&G's approach, including with their forecasts for how much energy SCE&G would need to produce to meet customer demand and the timing of that need. (R. p. 1024, line 10-p. 1025, line 22; Tr. Vol. I, p. 394, line 10-p. 395, line 22; R. p. 1046, line 3-p. 1051, line 2; Tr. Vol. I, p. 416, line 3-p. 421, line 2; R. p. 1053, lines 1-20, Tr. Vol. I, p. 423, lines 1-20; R. p. 1208, line 20-p. 1221, line 12; Tr. Vol. II, p. 578, line 20-p. 591, line 12; R. p. 1229, line 8-p. 1242, line 10; Tr. Vol. II, p. 599, line 8-p. 612, line 10; R. p. 1343, line 12-p. 1351, line 9; Tr. Vol. II, p. 713, line 12-p. 721, line 9; R. p. 1436; Tr. Vol. II, p. 806.) For instance, SCE&G's own witness conceded that solar facilities can meet SCE&G's summer capacity need, that winter capacity need could be met without investing capital in a new natural gas plant, and that SCE&G's resource plan (unlike its proposed rates) does attribute a capacity value to solar resources. (R. pp. 841-42, 1089; Tr. Vol I, pp. 211-212, 459; R. p. 1585; Hearing Exhibit 5, JML-4, p. 5; R. p. 1639; Hearing Exhibit 9, p. 40.) Multiple testifying witnesses provided alternatives to SCE&G's proposed avoided cost rates that they believed would comply with state and federal law and accurately compensate QFs. (R. p. 1221, line 15-p. 1222, line 11; Tr. Vol II, p. 591, line 15-p. 592, line 11; R. p. 1242, line 15-p. 1243, line 2; Tr. Vol. II, p. 612, line 15-p. 613, line 2; R. pp. 1398-1405; Tr. Vol. II, pp. 768-775).

In a divided decision, the Commission rejected these alternatives and approved SCE&G's requests. (R. pp. 189-94; Order No. 2018-708; R. pp. 138-88; Order No. 2018-322(A).) With regard to capacity, the Commission found that "SCE&G's proposal to set avoided capacity costs for its PR-1 and PR-2 rates at zero is reasonable at this time, ***in the absence of a viable alternative proposal being presented by any other party***." (emphasis added), (R. p. 152; Order No. 2018-322(A), p. 15.)

The Commission noted several areas of potential weakness in the SCE&G's calculations, in particular its new winter reserve margins – which it found "represent a novel approach to becoming a winter-peaking utility," which "has potentially adverse implications for certain types of generators," but noted that "no other party presented an alternative estimate of SCE&G's avoided capacity costs." (R. pp. 152-53; Order No. 2018-322(A), pp. 15-16.) It rejected a proposal by ORS to maintain the previously-approved avoided cost rates until SCE&G could address these weaknesses, finding "no evidence to demonstrate that maintaining such rates would be appropriate." (R. p. 153; Order No. 2018-322(A), p. 16.)

Commissioner Fleming dissented on the issue of avoided capacity costs, among other things. (R. p. 188; Order No. 2018-322(A), p. 51.) Commissioner Fleming also noted that:

> There was not enough time for the parties to engage in discovery in this docket and SCE&G either did not respond to discovery requests, responded late, or only responded partially. In my opinion, the condensed time period of this docket and these allegations of how SCE&G conducted discovery did not allow the other parties enough time to properly litigate this matter.

(R. p. 188; Order No. 2018-322(A), p. 51). The Commission brushed away these concerns and observed that it "did not receive any Motion to Compel nor any other indication of disputes in the discovery process, prior to the hearing." (R. p. 153; Order No. 2018-322(A), p. 16.)

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The SBA and other intervenors filed Petitions requesting that the Commission rehear and/or reconsider its findings and conclusions. (*See* R. p. 190; Order No. 2018-708, p. 2.) With regards to the argument that the Commission had improperly shifted the burden of proof from SCE&G to the intervenors, the Commission, in its Order Denying Rehearing and Reconsideration, responded that "the burden of proof always resides, as it must, with SCE&G." (*See id.*) The Commission continued: "However, the other parties do have a burden of persuasion that their proposed alternatives are reasonable and viable if they seek adoption of those alternatives, as they did in this proceeding." (R. pp. 190-91; Order No. 2018-708, pp. 2-3.) The Commission also indicated that the intervenors could only have met this burden of persuasion by producing "probative evidence of a computed factor as opposed to a mere concept for deriving a factor," and that none of the rate proposals made by the intervenors "represent fully viable alternatives." (R. p. 191; Order No. 2018-708, p. 3.)

Intervenors also complained, as did Commissioner Fleming, that there was no way they could have computed such a "fully viable alternative" set of rates, given SCE&G's refusal to provide, in discovery, sufficient information for them to calculate such alternative rates. (R. pp. 191-92; Order No. 2018-708, pp. 3-4.) The Commission waved away these concerns, responding that: "If there were a discovery dispute, the proper mechanism to require a party to provide properly discoverable information is a motion to compel." (R. p. 191; Order No. 2018-708, p. 3.)

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Finally, the SBA asked the Commission to use post-hearing compliance filings to fill evidentiary gaps. (R. p. 193; Order No. 2018-708, p. 5.) The Commission denied that request and concluded that "it is inappropriate and improper for a party to attempt to use post-hearing compliance filings as a method to force an adverse party to generate the moving party's own proposals." (*Id.*)

Appellant SBA appeals from the Commission's Challenged Orders, which approve SCE&G's elimination of avoided capacity payments to QFs.

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STANDARD OF REVIEW

Any party may appeal from all or any portion of a final order or decision of the Commission regarding a public utility's rates to the South Carolina Supreme Court. S.C. Code Ann. § 58-27-2310; SCACR 203(d)(2)(A). The Supreme Court "may reverse or modify the decision [of the Commission] if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

S.C. Code Ann. § 1-23-380, (1976, as amended).

South Carolina Appellate Courts, "employ a deferential standard of review when reviewing a [Commission] decision and will affirm that decision if substantial evidence supports it." *Porter v. S.C. Pub. Serv. Comm'n*, 333 S.C. 12, 20, 507 S.E.2d 328, 332 (1998). "Substantial evidence is relevant evidence that, considering the record as a whole, a reasonable mind would accept to support an administrative agency's action. *Id.* (further noting that substantial evidence exists "when, if the case were presented to a jury, the court would refuse to direct a verdict because the evidence raises questions of fact for the jury"). The party challenging a Commission decision "bears the burden of convincingly proving that the decision is clearly erroneous, or arbitrary or capricious, or an abuse of discretion, in view of the substantial evidence on the whole record." *Id.*

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"This deferential standard of review does not mean, however, that the Court will accept an administrative agency's decision at face value without requiring the agency to explain its reasoning." *Id.* The Commission's findings of fact "must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings." *Able Commc'ns, Inc. v. S.C. Pub. Serv. Comm'n*, 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986) (remanding for further findings by the Commission); *see* S.C. Code Ann. § 58-27-2100 (The Commission's "findings shall be in sufficient detail to enable the court on review to determine the controverted questions presented by the proceeding and whether proper weight was given to the evidence.").

"No particular format is required" for the Commission's findings of fact, but "a recital of conflicting testimony followed by a general conclusion is patently insufficient to enable a reviewing court to address the issues." *Able*, 290 S.C. at 411, 351 S.E.2d at 152. "[P]reviously adopted policy" or "illusory" supporting rationale also may not serve as the basis for the Commission's action. *Hamm v. S.C. Pub. Serv. Comm'n*, 309 S.C. 282, 289, 422 S.E.2d 110, 114 (1992) (remanding for further findings by the Commission); *see also Heater of Seabrook, Inc. v. Pub. Serv. Comm'n of S.C.*, 324 S.C. 56, 64, 478 S.E.2d 826, 830 (1996) (setting aside a Commission decision where supporting rationale was "illusory"). Finally, the "expert" status of the Commission "does not somehow diminish the PSC's duty to support its conclusions with factual findings; indeed, that status *heightens* the duty to make explicit findings of fact which allow meaningful appellate review of these complex issues." *Seabrook Island Prop. Owners Assoc. v. S.C. Pub. Serv. Comm'n*, 303 S.C. 493, 497, 401 S.E.2d 672, 674 (1991) (emphasis added).

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ARGUMENT

Introduction and Summary of Arguments

Prior to 2016, South Carolina had virtually no independently-owned renewable energy sector. With almost $1 billion invested since then, there are now more than 2,800 South Carolina residents employed by over 80 companies in the independent solar energy sector in the State. Appellant, SBA is the voice of solar in South Carolina. Its mission is to create a positive business environment for solar energy here and to represent the interests of its members in proceedings such as this one.

As indicated above, Congress enacted PURPA in 1978 to encourage diversity in the nation's electric energy supply. Specifically, Congress sought to incentivize the development of electric generation resources by independent power producers to create competitive pressure on traditional vertically integrated monopoly utilities. In doing so, Congress recognized that monopolistic investor-owned utility companies have little incentive to buy power from independent power producers seeking to enter the market, and therefore required electric utilities to purchase the output of QFs.

PURPA, as implemented by the FERC and state public service commissions, requires utilities like SCE&G to buy the power produced by small renewable generators that meet the statutory criteria to be considered QFs, at rates equal to the "avoided cost" of that power. Inaccurate avoided cost rates not only infringe QFs' rights under PURPA but also send incorrect price signals to QFs and discourage investment, depriving ratepayers of the opportunity to obtain cost-competitive renewable power.

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Over the long term, inaccurate avoided cost rates can also result in higher costs for ratepayers, since without adequate investment from independent renewable developers there is no downward pressure on utility generation costs, and utilities will continue to satisfy electricity needs with utility-owned resources, typically with long-term cost recovery based on higher costs of service. In other words, inaccurate rates under-incentivize QF development and deprive ratepayers of cost-competitive renewable power while overcharging them for their electricity.

The Commission conducts periodic proceedings to determine SCE&G's avoided cost rates. Under PURPA, QFs are compensated for both the energy and capacity that they provide to SCE&G and its customers. Avoided cost rates therefore include an "avoided energy" component and an "avoided capacity" component. The rates are required to reflect the fact that QFs provide energy and capacity to SCE&G. Avoided cost rates are calculated using complex methodologies, including computer simulations that are proprietary to SCE&G and, to which, Appellants including SBA were not given access during the rate-making proceedings.

In early 2017, SCE&G revised its rates to substantially decrease the capacity payments made to QFs. SCE&G attributed the proposed reduction in capacity rates to the planned completion of the V.C. nuclear project, which SCE&G claimed would satisfy the most of SCE&G's capacity needs for the immediate future. After the abandonment of the V.C. Summer project in the summer of 2017, SCE&G did not revise its capacity rates upward to account for the capacity shortfall created by the cancellation of that project. Instead SCE&G declined to provide a rate update (which was, according to the schedule previously requested by SCE&G, due in November 2017), and then in 2018 proposed rates that completely eliminated capacity payments for solar QFs.

SCE&G justified the elimination of capacity payments on the premise that solar QFs do not provide capacity on most cold winter mornings, and on SCE&G's decision that SCE&G now (contrary to past practice) was required to maintain huge reserves of capacity on those same winter mornings. This was a major departure from SCE&G's prior, Commission-approved methodologies for calculating avoided cost.

The Commission approved SCE&G's revised rates, including its elimination of capacity payments to solar QFs. Despite the fact that SCE&G had the burden of proof to demonstrate that its avoided cost rates were just and reasonable, the Commission concluded that SCE&G's proposal was reasonable because SBA and other intervenors failed to present the Commission with a viable adequate alternative proposal. (*See* R. p. 152; Order No. 2018-322(A), p. 15 ("SCE&G's proposal to set avoided capacity costs for its PR-1 and PR-2 rates at zero is reasonable at this time, in the absence of a viable alternative proposal being presented by any other party.").) This was reversible error. The Commission also erred in failing to find that the SBA (and other intervenors) presented sufficient evidence to raise a "specter of imprudence" with respect to SCE&G's proposal, thereby overcoming any presumption of reasonableness with respect to that proposal and placing the burden or persuasion on SCE&G to prove its reasonableness. Indeed, the Commission failed to make any findings of fact with respect to the "specter of imprudence" demonstration, which was itself reversible error.

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The net result of these errors is an inaccurate avoided capacity rate that significantly under-values solar generation while increasing risks to ratepayers. Lower avoided cost rates mean that less of the utility's energy and capacity needs will be satisfied by QF generation, and more will be satisfied by the utility's owned generation resources, bringing more revenue to SCE&G. This will benefit SCE&G's (now Dominion Energy's) shareholders, to the detriment of solar QFs and ratepayers.

Accordingly, this Court should reverse the Challenged Orders, which include the Commission's approval of SCE&G's proposal to eliminate avoided cost payments to independent renewable energy producers and require the Commission to accurately determine avoided cost rates for SCE&G.

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I. THE COMMISSION ERRED BY IMPROPERLY SHIFTING THE BURDEN OF PROOF TO INTERVENORS, AND IN ACQUIESCING TO SCE&G'S PROPOSAL TO ELIMINATE CAPACITY PAYMENTS TO INDEPENDENT POWER PRODUCERS.

It is undisputed that SCE&G has the burden to prove that its rates and expenses are "just and reasonable." S.C. Code Ann. § 58-27-810 ("Every rate made, demanded or received by any electrical utility or by any two or more electrical utilities jointly shall be just and reasonable."); *id.* § 58-27-865(F) ("The commission shall disallow recovery of any fuel costs that it finds without just cause to be the result of failure of the utility to make every reasonable effort to minimize fuel costs or any decision of the utility resulting in unreasonable fuel costs ...."). In addition, PURPA requires that a utility's rates for purchases from QFs:

> (1) shall be just and reasonable to the electric consumers of the electric utility and in the public interest, and
>
> (2) shall not discriminate against qualifying cogenerators or qualifying small power producers.

16 U.S.C. § 824a-3(b); see also 18 C.F.R. § 292.304(a) (same).

When the Commission considers a utility's proposed rates, they are entitled to an initial presumption of reasonableness. *Hamm*, 309 S.C. at 286, 422 S.E.2d at 112. But once an intervening party or the Commission demonstrates a "tenable basis for raising the specter of imprudence," there is no longer a presumption of reasonableness, and the utility then bears the burden to "further substantiate its claim[s]." *Id.*; *see also Utilities Servs. of S.C., Inc. v. S.C. Office of Regulatory Staff*, 392 S.C. 96, 109-10, 708 S.E.2d 755, 762-63 (2011) (noting that "the presumption in a utility's favor clearly does not foreclose scrutiny and a challenge"). "The ultimate burden of showing every reasonable effort to minimize fuel costs remains on the utility." *Hamm*, 309 S.C. at 286-87, 422 S.E.2d at 112-13.

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In its Amended Order, the Commission found that "SCE&G's proposal to set avoided capacity costs for its PR-1 and PR-2 rates at zero is reasonable at this time, *in the absence of a viable alternative proposal being presented by any other party.*" (R. p. 152; Order No. 2018-322(A), p. 15 (emphasis added).) The Commission continued that: "The calculation of generation required in the winter as presented by SCE&G, including a significant reserve margin, is accepted by the Commission at this time, *but remains a subject upon which alternative calculation would be entertained in future fuel proceedings.*" (*Id.* (emphasis added).)

Thus, in the Amended Order, the Commission appears to have imposed a burden on the SBA and other intervenors to show the reasonableness of a "viable alternative proposal," and concluded that in the absence of such an alternative proposal, SCE&G's proposed rates were presumptively reasonable. The Commission confirmed this was its approach in its Order Denying Rehearing or Reconsideration (R. pp. 189-94). When the issue of the Commission's misapplication of the burden was raised in the SBA's and other intervenors' Petition for Rehearing and Reconsideration, the Commission responded that "the burden of proof always resides, as it must, with SCE&G." (*See* R. p. 190; Order No. 2018-708, p. 2.) But the Commission further noted that "the other parties do have a burden of persuasion that their proposed alternatives are reasonable and viable if they seek adoption of those alternatives, as they did in this proceeding." (R. p. 191; Order No. 2018-708, p. 3.)

It was clearly improper for the Commission to impose a burden of persuasion on intervenors to put forth a "fully viable" alternative proposal. That is because the initial presumption of reasonableness to which the utility is entitled "*does not shift the burden of persuasion* but shifts the burden of *production* on to the Commission or other contesting party to

demonstrate a tenable basis for raising the specter of imprudence." *Hamm*, 309 S.C. at 286, 422 S.E.2d at 112 (emphasis added).

The Commission's shifting of the burden of persuasion to intervenors was not supported by any statute, regulation, or court opinion. In fact, it is directly contrary to this Court's precedent. *Hamm*, 309 S.C. at 286, 422 S.E.2d at 112 (holding that the SCE&G's initial presumption of reasonableness "does not shift the burden of persuasion"). Even if this shifting of the burden had been legally permissible (and it was not), the SBA and other intervenors had no notice whatsoever that it was their burden to present viable alternative proposals. Without such notice, intervenors had no opportunity to conduct discovery to support a potential alternative proposal. Intervenors, the South Carolina Conservation League and Southern Alliance for Clean Energy's Witness made clear in response to Commission questions that, given the timeframe on which the Docket was conducted and the lack of critical system information from SCE&G, it would have been impossible to calculated a viable alternative rate. (R. p. 797, lines 4-25; Tr. Vol. I, p. 167, lines 4-25.).

The fact that the Commission shifted the burden to intervenors to calculate a "fully viable" alternative rate is particularly egregious, given that the Commission did not require SCE&G to actually calculate an avoided capacity rate. As discussed, SCE&G did not perform any calculations to arrive at its zero avoided capacity rate. Rather, it simply concluded that solar QFs provide no capacity value to the system and ended the analysis there. It was arbitrary and capricious for the Commission to approve SCE&G's proposed rates as just and reasonable on the basis of this "mere concept," (R. p. 191; Order No. 2018-708, p. 3), while holding intervenors to the higher burden of calculating a "fully viable alternative" rate. *Id.*

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The Commission had several options to address the SBA's and other Intervenors' concerns about having the burden to prove viable alternative rates. SBA, ORS, and other parties proposed several options, including bifurcating the docket to allow additional time to develop evidence on avoided cost rates; allowing time for additional discover; requiring SCE&G to produce (before the hearing) updated rates using the prior Commission-approved methodologies with new inputs; and requiring SCE&G to make a compliance filing after the hearing addressing methodological problems. If nothing else, the Commission could have simply kept the existing rates, *which it had previously concluded were just and reasonable,* in effect.[2] The Commission rejected each of these proposals and chose the option that is not legally defensible – shifting the burden of proof to SBA and the other intervenors, with no notice prior to issuance of a final order.

The Commission's approach is contrary to the decisional authority of this Court and fundamentally inconsistent with Due Process. This Court therefore must reverse the Challenged Orders and instruct the Commission to properly apply the *Hamm* burden-shifting scheme.

[2] *See* R. p. 34; Order No. 2017-246, p. 34. The Commission did not make any finding that the avoided cost rates already in effect were unreasonable. Rather, it concluded (without citing any evidence) that there was "no evidence to demonstrate that maintaining such rates would be appropriate." (R. p. 153; Order No. 2018-322(A), p. 16.)

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II. THE COMMISSION ERRED IN FAILING TO FIND THAT INTERVENORS RAISED A "SPECTER OF IMPRUDENCE" WITH RESPECT TO SCE&G'S PROPOSAL TO ELIMINATE CAPACITY PAYMENTS TO INDEPENDENT POWER PRODUCERS AND IN FAILING TO MAKE ANY FINDINGS OF FACT ON THIS QUESTION.

SBA and the other intervenors presented the Commission with more than sufficient evidence to raise a "specter of imprudence" as to SCE&G's proposed rates. The notable issues with the SCE&G's avoided capacity payments calculation include:

- SCE&G did not adequately demonstrate that its winter capacity need exceeds its summer capacity need (R. p. 1025, lines 14-22; Tr. Vol. I, p. 395, lines 14-22; R. p. 1049, line 3-p. 50, line 16; Tr. Vol. I, p. 419, line 3-p. 410, line 16; R. p. 1209, line 2-p. 1221, line 2; Tr. Vol. II, p. 579, line 2-p. 591, line 2; R. p. 1458; Tr. Vol. II, p. 828);
- SCE&G did not adequately justify its adoption of a 21% winter reserve margin, which was a primary driver of its conclusion that solar QFs are not entitled to capacity payments (R. p. 748, line 21-p. 756, line 20; Tr. Vol. I, p. 118, line 21-p. 126, line 20; R. p. 790, line 14-p. 794, line 18; Tr. Vol. I., p. 160, line 14-p. 164, line 18);
- SCE&G's change from an 80/20 summer/winter capacity payment allocation to a 0/100 summer/winter capacity payment allocation was not justified (R. p. 1016, line 1-p. 1018, line 2; Tr. Vol. I, p. 386, line 1-p. 388, line 2; R. p. 1360, lines 6-13; Tr. Vol. II, p. 730, lines 6-13);
- SCE&G's proposal was contradicted by its own witness Lynch, who conceded that solar QFs have capacity value and can be used to meet its summer capacity need over

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the planning period (R. pp. 841-42, 1089; Tr. Vol I, pp. 211-212, 459; R. p. 1585; Hearing Exhibit 5, JML-4, p. 5; R. p. 1639; Hearing Exhibit 9, p. 40);

- SCE&G's proposal was contradicted by its own Integrated Resource Plan, which applies a capacity value to solar resources (R. p. 1054, lines 22-24; Tr. Vol. I, p. 424, lines 22-24); and
- SCE&G's reliance on the Integrated Resource Plan ("IRP") was fundamentally flawed:
  - The IRP was still being reviewed (R. p. 1023, lines 6-7; Tr. Vol. I, p. 393, lines 6-7; R. p. 1053; Tr. Vol. I, p. 423, lines 16-20; R. p. 1099, line 21-p. 1104, line 5; Tr. Vol. II, p. 469, line 21-p. 474, line 5);
  - SCE&G did not optimize its plan (R. p. 1023, lines 9-12; Tr. Vol. I, p. 393, lines 9-12; R. p. 1104, line 6-p. 1105, line 3; Tr. Vol. II, p. 474, line 6-p. 475, line 3; R. p. 1109, line 2-p. 1117, line 24; Tr. Vol. II, p. 479, line 2-p. 487, line 24; R. p. 1345, line 10-p. 1347, line 14; Tr. Vol. II, p. 715, line 10-p. 717, line 14; R. p. 1436; Tr. Vol. II, p. 806);
  - The winter peak load forecast was overstated (R. p. 1212, line 14; Tr. Vol. II, p. 582, line 14; R. p. 1220, line 4; Tr. Vol. II, p. 590, line 4; R. p. 1231, line 5-p. 1234, line 16; Tr. Vol. II, p. 601, line 5-p. 604, line 16; R. p. 1237, line 5-p. 1251, line 11; Tr. Vol. II, p. 607, line 5-p. 621, line 11; R. pp. 1457-59; Tr. Vol. II, pp. 827-829); and
  - The winter reserve margin was likewise too high (R. p. 1019, line 8-p. 1021, line 25; Tr. Vol. I, p. 389, line 8-p. 391, line 25; R. p. 1046, line 2-p. 1047, line 9; Tr. Vol. I., p. 416, line 2-p. 417, line 9; R. p. 1048, line 1-p. 1049, line 2; Tr. Vol. I, p.

418, line 1-p. 419, line 2; R. p. 1210, line 4-p. 1212, line 13; Tr. Vol. II, p. 580, line 4-p. 582, line 13; R. p. 1212, line 14; Tr. Vol. II, p. 582, line 14; R. p. 1220, line 4; Tr. Vol. II, p. 590, line 4; R. p. 1230, line 1-p. 1231, line 1; Tr. Vol. II, p. 600, line 1-p. 601, line 4; R. p. 1234, line 16-p. 1237, line 4; Tr. Vol. II, p. 604, line 16-p. 607, line 4).

Given this extensive evidence, it is indisputable that SBA and other Intervenors met their burden to produce evidence raising a "specter of imprudence" with respect to the proposed rates, thereby placing the burden of persuasion and proof on SCE&G to demonstrate that its proposal was just, reasonable, and in the public interest. Notwithstanding this extensive evidence, the Commission erroneously failed to find that the SBA and other intervenors had raised a specter of imprudence. This Court should reverse that error and find that sufficient evidence was presented to raise a "specter of imprudence" under *Hamm*.

III. IN THE ALTERNATIVE, THE COMMISSION ERRED BY FAILING TO MAKE SUFFICIENT FACTUAL FINDINGS AS TO ITS APPLICATION OF THE BURDEN-SHIFTING SCHEME IN CONNECTION WITH ITS APPROVAL OF SCE&G'S PROPOSAL TO ELIMINATE CAPACITY PAYMENTS TO INDEPENDENT POWER PRODUCERS.

The Commission's error is compounded by the fact that it did not even *make* findings of fact on the "specter of imprudence" issue, making it unclear whether the Commission made a tacit determination that intervenors failed to present sufficient evidence to establish a "specter of imprudence" or simply applied the wrong legal standard and ignored the *Hamm* burden-shifting scheme. S.C. Code Ann. § 58-27-2100 provides: "After the conclusion of a hearing the Commission shall make and file its findings and order with its opinion, if any. Its findings shall be in sufficient detail to enable the court on review to determine the controverted questions presented by the proceeding and whether proper weight was given to the evidence." Though

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"[t]he right to weigh the evidence is peculiarly within the Commission's province," *S. Bell Tel. & Tel. Co. v. Pub. Serv. Comm'n*, 270 S.C. 590, 598, 244 S.E.2d 278, 282 (1978), "whether or not the applicant has met *its burden* depends upon the weight and credibility assigned to the evidence presented," *Greyhound Lines, Inc. v. S.C. Pub. Serv. Comm'n*, 274 S.C. 161, 165, 262 S.E.2d 18, 21 (1980) (emphasis added).

Given the absence of any findings on this issue by the Commission, if this Court does not agree that the evidence shows that the intervenors met their burden of production with regard to the "specter of imprudence" test, it should remand this matter to the Commission to make proper factual findings on that question. In the absence of such findings, this Court has no basis to conclude that intervenors failed to demonstrate a "specter of imprudence" and thereby place the burden of persuasion on SCE&G. *See Able Commc'ns*, 290 S.C. at 411, 351 S.E.2d at 152 ("The Commission's findings of fact "must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings."); *see also* S.C. Code Ann. § 58-27-2100 (The Commission's "findings shall be in sufficient detail to enable the court on review to determine ... whether proper weight was given to the evidence."). This Court must therefore reverse the Challenged Orders.

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CONCLUSION

For these reasons and the reasons stated in the South Carolina Solar Business Alliance's Initial Brief, this Court therefore must reverse the Commission's approval of SCE&G's Avoided Cost Tariffs PR-1 and PR-2 and 2018 Net Energy Metering Rider to Retail Rates, which is set out in the Commission's May 2, 2018 Amended Order, May 23, 2018 Directive Order, and October 30, 2018 Order denying the petitions for reconsideration or rehearing. Further, this Court should remand to the Commission with instructions that: (**i**) intervenors have met their burden of raising a "specter of imprudence" with respect to the proposed rates (or, in the alternative, that the Commission must make factual findings with regard to whether intervenors have met their burden of production on this issue); (**ii**) SCE&G must meet its burden to demonstrate that its proposed rates (and in particular its proposal to eliminate capacity payments to independent power producers) are just, reasonable, and in the public interest; and (**iii**) petitioners are not required to calculate a "fully viable alternative rate" in order to defeat SCE&G's attempts to prove that its rate are just, reasonable, and in the public interest.

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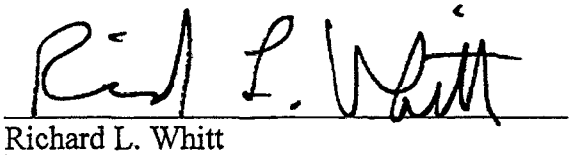
Respectfully submitted this the 10th day of June, 2019.



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June 10, 2019

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THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

Appellate Case Nos. 2018-001165 and 2018-002117

Public Service Commission Docket No. 2018-2-E

South Carolina Coastal Conservation League and
Southern Alliance for Clean Energy..... Appellants,

v.

South Carolina Electric & Gas, CMC Steel South Carolina,
South Carolina Energy Users Committee, South Carolina
Solar Business Alliance, LLC, Southern Current, LLC and
South Carolina Office of Regulatory Staff, ...Respondents.

and

South Carolina Solar Business Alliance, LLC, ...Appellant,

v.

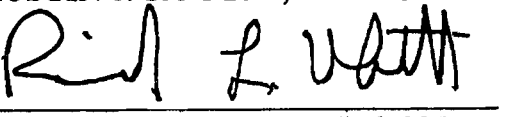
South Carolina Coastal Conservation League and Southern Alliance for
Clean Energy, South Carolina Electric & Gas, CMC Steel South Carolina,
South Carolina Energy Users Committee, Southern Current, LLC, and
South Carolina Office of Regulatory Staff,

Of whom South Carolina Electric & Gas and South Carolina
Office of Regulatory Staff, are..... Respondents.

**RULE 211(b), SCACR CERTIFICATION,
FINAL BRIEF OF APPELLANT**

I, Richard L. Whitt hereby certify that the Final Brief of Appellant, South Carolina Solar Business Alliance, Inc., complies with the requirements set forth in Rule 211(b), of the South Carolina Appellate Court Rules.

AUSTIN & ROGERS, P.A.

By: 

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